

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WARREN JOVAN SANFORD,

Defendant-Appellant.

UNPUBLISHED

January 21, 2010

No. 289887

Wayne Circuit Court

LC No. 08-011464-FC

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

A jury convicted defendant for armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, stealing a firearm of another, MCL 750.357b, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 15 to 40 years' imprisonment for the armed robbery conviction, one to five years' imprisonment for the felon in possession of a firearm conviction, one to five years' imprisonment for the stealing a firearm of another conviction, one to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm. Defendant was sentenced as a third habitual offender, MCL 769.11 for each conviction except the felony-firearm conviction. Defendant appeals as of right. His sole issue on appeal is that the prosecution engaged in improper conduct by shifting the burden of proof onto defendant. We conclude the prosecution did not engage in any improper conduct. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Standard of Review

This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. To avoid forfeiture of the issue under the plain error test, the defendant must show that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To show plain error affecting the defendant's substantial rights, the defendant must prove prejudice occurred, meaning that the error must have affected the outcome of the lower court proceedings. *Id.*

II. Analysis

In reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecution's remarks in context. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). The propriety of the prosecution's comments depends on the specific facts of each case because "a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.* Prosecutors are allowed to argue all reasonable inferences that arise from the evidence and need not confine the argument to "the 'blandest of all possible terms.'" *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Additionally, otherwise improper comments by the prosecution may not require reversal when they are made in response to issues raised by the defendant. *Callon*, *supra* at 330, citing *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Furthermore:

where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

The prosecutor, in his closing rebuttal argument, stated:

Did he [defendant] take anything of value from him [the victim], that he was not allowed to take? And we know that he did, because it was found in the defendant's pocket. The items were found in his pocket. And there's no explanation for why they got there, other than the fact that he took it in the robbery. How else would he get – how else would his property, Mr. Kyles' [sic] property, get into the defendant's pocket? How would that happen? What other explanation do you have? [Emphasis added.]

Defendant contends the above emphasized statements from the prosecution improperly shifted the burden of proof to defendant. However, defendant's theory of the case was that another man committed the robbery and defendant was merely present at the scene. Thus, the prosecution's rebuttal argument was simply addressing that the evidence proved defendant's guilt beyond a reasonable doubt despite defendant's contention he was merely present at the scene. The prosecutor did not shift the burden of proof onto defendant. Rather, he challenged the credibility of defendant's theory of the case. "When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Fields*, *supra* at 116. See also *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005); *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003); *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999).

Additionally, both the prosecution and defense stated that the prosecution has the burden of proof for each crime charged. The trial court properly instructed the jury that defendant was innocent until proven guilty, that the prosecution bears the burden of proving each element of each charged crime beyond a reasonable doubt, and that the attorneys' statements and arguments are not evidence. Thus, any potential prejudice arising from the prosecution's comments was dispelled. *See People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995) (comments made by the prosecution during closing arguments were not improper when read in their entirety and the trial court's instructions to the jury that the attorney's arguments were not evidence dispelled any prejudice). In looking at the pertinent record and evaluating the prosecutor's comments in context, defendant cannot show plain error affecting his substantial rights.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra